

HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

KING COUNTY, WASHINGTON; DOW
CONSTANTINE, in his official capacity as
King County Executive,

Defendants.

Case No. 2:20-cv-203 RJB

DEFENDANTS' MOTION TO MODIFY
CASE SCHEDULE

**NOTE ON MOTION CALENDAR:
OCTOBER 28, 2022**

I. INTRODUCTION

Defendants King County and Dow Constantine (the County) move pursuant to Local Civil Rules 7(j) and 16(b)(6) and for the reasons below to modify the case schedule issued by the Court on May 23, 2022 (Dkt. #46). There is good cause to extend the case schedule because, despite the County's diligence, there is extensive discovery remaining that affects potential expert witness disclosures and necessitates a trial continuance. Additionally, extending the case schedule will accommodate the County's other trial obligations in the spring. Although this is not a stipulated motion, the United States (the Government) does not oppose the County's motion to continue the case schedule.

II. STATEMENT OF FACTS

A. The Government Sued the County to Invalidate its Executive Order and Force the County to Assist the Government in its Deportation Mission.

1 On February 10, 2020, the Government filed its complaint against the County alleging that
2 a King County Executive Order is unconstitutional and preempted by federal law. The Executive
3 Order, issued on April 23, 2019, delegates authority to the King County Facilities Management
4 Division to “[e]nsure that all future [fixed base operator (FBO)] leases, operating permits, and
5 other authorizations for commercial activity at King County International Airport [a/k/a Boeing
6 Field] contain a prohibition against providing aeronautical or non-aeronautical services to
7 enterprises engaged in the business of deporting immigration detainees (except for federal
8 government aircraft), to the maximum extent permitted by applicable law.” Dkt. #1 (Ex. A).

9 On March 5, 2020, the County filed its Answer, denying the Government’s substantive
10 allegations and asserting eight affirmative defenses. Dkt. #13. Among other things, the County
11 averred that the Executive Order, which only affects future leases of FBOs, does not harm ICE
12 (*i.e.*, ICE lacks standing), the Executive Order does not pose an obstacle to ICE’s immigration
13 enforcement activities, the County is a market participant with the power to manage its assets as
14 necessitated by market conditions, and the County is entitled under the Tenth Amendment to
15 refuse to assist the Government in its immigration activities. Dkt. #13. Discovery to date
16 demonstrates that the FBO’s at Boeing Field decided not to service ICE flights for their own
17 independent business reasons, including concerns about safety and protests at Boeing Field.

18 Approximately one month later, the Government moved for judgment on the pleadings,
19 which the County opposed given the numerous factual issues that required discovery before a
20 decision on the merits, including facts relevant to the Government’s standing. The Court agreed
21 with the County, and denied the motion, stating “[c]rediting the County’s denials in its Answer, as
22 is required in this motion, the United States has not yet established that it has Article III standing
23 or that the controversy is ripe.” Dkt. #26. The Court directed the parties to “continue with
24 discovery.” *Id.*

B. The County Has Been Diligently Working Towards Completing Fact and Expert Discovery.

On May 23, 2022, the Court entered a Stipulated Modified Case Schedule, setting trial for March 20, 2023, and interim deadlines for disclosing expert testimony under FRCP 26(a)(2) (October 14, 2022¹), filing discovery motions (November 3, 2022), and completing discovery (December 19, 2022). The County cannot reasonably meet these deadlines despite its diligence.

Although the case schedule has been modified several times by stipulation, the parties stipulated that earlier modifications were caused by the Covid-19 pandemic and its effect on the parties' ability to collect, review, and produce documents, and the Government's need for a protective order to resolve its concerns about producing the personally identifiable information of lower-level employees of Immigration and Customs Enforcement in light of the County's obligations under the Washington Public Records Act. *See* Dkt. #45.

Since entry of the May 23, 2022, order, the parties have continued to work towards completing document discovery, but significant document discovery remains outstanding. The County issued additional discovery requests to the Government on August 31, 2022, and requested that the Government supplement its prior document productions with documents responsive to certain of its requests for productions created after the date of the complaint. Martinez Decl. ¶ 3. On September 30, 2022, the Government agreed to search for and produce these responsive documents. Martinez Decl. ¶ 4. To date, the County has not received those documents, which the County believes are relevant to its defense of demonstrating that the Government has not been harmed by the Executive Order and that its immigrations operations have not been impacted by any preempted action of the County. Martinez Decl. ¶ 5. The parties conferred on October 4, 2022, regarding the status of the Government's collection and review efforts, but the Government was not able to commit to a date certain for that production given that it is reviewing

¹ The Government agreed to extend this deadline by stipulation pending the court's review of this motion. The parties filed that stipulation contemporaneously with this motion.

1 approximately 15,000 documents and likely will need to apply redactions for personally
2 identifiable information. Martinez Decl. ¶ 6.

3 Additionally, on June 7, 2022, the County issued a subpoena to GEO Group, the entity that
4 provides transportation for detainees between the Northwest Detention Center and the airports that
5 ICE uses for immigration flights (previously Boeing Field and currently Yakima Air Terminal).
6 Martinez Decl. ¶ 7. The Government contends that costs for transportation increased when the
7 Government began using Yakima Air Terminal, a change it claims was needed because of the
8 Executive Order. *See, e.g.*, Dkt. #1. The County requested documents from GEO Group related to
9 these alleged cost increases but did not receive responsive documents based on GEO Group's
10 contention that the documents contain trade secret information and that the burden of providing
11 these documents was disproportionate to the needs of the case. Martinez Decl. ¶ 7. On September
12 20, 2022, the County conferred with GEO Group, and GEO Group agreed to produce select cost
13 documents, which the County agreed to review before seeking additional documents. Martinez
14 Decl. ¶ 8. GEO Group also informed the County that the Government receives monthly invoices
15 for transportation costs. Martinez Decl. ¶ 9. The County previously had requested those
16 documents from the Government, but they were never produced. Martinez Decl. ¶ 10. The
17 County again requested those documents on September 28, 2022, and the Government agreed to
18 search for invoice documents, but to date those have not been produced. Martinez Decl. ¶ 11.

19 The County also successfully moved to compel compliance with document subpoenas from
20 Classic and iAero Airways, each of which failed to timely produce documents in response to the
21 County's subpoenas. Classic produced responsive documents on July 20, 2022. Martinez Decl. ¶
22 12. iAero Airways was ordered to produce documents on October 21, 2022, though the County
23 reserved its rights to seek additional documents from iAero given its search parameters. Martinez
24 Decl. ¶ 12.

1 In addition to written and document discovery, the parties have engaged in depositions.
2 Specifically, the County has deposed the former Deputy Director of the Seattle Field Office for
3 ICE, a corporate representative from Classic Air Charter (Classic) (the entity that charts ICE
4 flights), and both parties deposed a corporate representative for Modern Aviation (a fixed base
5 operator at Boeing Field). Martinez Decl. ¶ 13. The parties also have scheduled depositions for
6 Natalie Asher, former ICE employee (October 25, 2022), ICE's 30(b)(6) representative (October
7 20, 2022), and the County's 30(b)(6) representative (November 9, 2022). Martinez Decl. ¶ 14. In
8 addition to these scheduled depositions, the County anticipates deposing an ICE employee from
9 the ICE Air Operations division but cannot complete that deposition until the Government
10 completes its document productions. Martinez Decl. ¶ 15. The County also anticipates deposing a
11 GEO Group representative and an ICE contracting officer but cannot productively take these
12 depositions until both GEO Group and the Government have produced responsive documents
13 related to the GEO Group contract. Martinez Decl. ¶ 16. The County may depose a corporate
14 representative from iAero Airways but cannot determine whether a deposition is needed until the
15 County has the opportunity to review its forthcoming document production. Martinez Decl. ¶ 17.

16 As a result of the remaining fact discovery, the County's government contracting expert
17 cannot proceed with evaluating the Government's contention that its costs have increased based on
18 operating flights from Yakima. Martinez Decl. ¶ 18. To date, document discovery and deposition
19 testimony suggest that the GEO Group contract could have been optimized to avoid any alleged
20 increased costs given that the contract obligates the Government to pay for a "guaranteed
21 minimum" number of miles, but the County's government contracting expert can provide his
22 opinion once all pertinent documents are produced and deposition testimony on this topic is taken
23 from ICE and GEO Group. Martinez Decl. ¶ 18. The County anticipates it will be several months
24 before the final document productions, necessary depositions, and expert work can be complete.
25

C. A Trial Date in July 2023 Is the Earliest Available Date.

In addition to the outstanding discovery necessary for its defenses, an extension also is needed because of counsel's trial schedule in other matters. On October 6, 2022, King County Superior Court issued a revised case schedule for a complex products liability litigation in which counsel represents King County. Martinez Decl. ¶ 19. That case was rescheduled for trial on April 24, 2023, based on the trial court's criminal docket backlog, and is scheduled for six weeks. Martinez Decl. ¶ 19. Counsel also has trial scheduled on June 20, 2023 in another matter pending before Judge Zilly, which is anticipated to last three weeks. Martinez Decl. ¶ 19. Accordingly, the earliest the County can try this case is July 20, 2023.

D. The Government Takes No Position on an Extension.

On October 4, 2022, the County and the Government conferred regarding outstanding discovery and the Government indicated an extension for discovery may be appropriate. Martinez Decl. ¶ 20. The County thereafter provided the Government with a proposed case schedule extension, extending the trial date and accompanying dates by approximately four months. Martinez Decl. ¶ 21 & Ex. A.

The Government declined to stipulate to the modified case schedule and informed the County that the County should represent the Government's position with respect to a motion for an extension as follows:

The United States takes no position on the proposed motion for an extension and, on that basis, will not oppose it. *See* W.D. Wa. L.R. 7(d)(1). Because the United States does not believe further discovery is necessary in this case, it intends to file a renewed motion for judgment on the pleadings, or in the alternative for summary judgment, by early November.

Martinez Decl. Ex. A.

III. ARGUMENT

The Court may modify a scheduling order if a party demonstrates "good cause." Fed. R. Civ. P. 16(b)(4). The decision to modify a scheduling order is within the broad discretion of the

1 district court. *Ginzkey v. Nat'l Sec. Corp.*, No. 18-1773, 2022 WL 1110976, at *1 (W.D. Wash.
 2 Mar. 10, 2022) (citation omitted). The good cause standard primarily considers “the diligence of
 3 the party seeking amendment.” *Id.* “If a party has acted diligently yet cannot reasonably meet the
 4 scheduling deadlines, the court may allow modification of the schedule.” *Id.*

5 Here, the County has acted diligently in requesting documents from the Government and
 6 third parties with information relevant to this litigation. Despite that diligence, the Government,
 7 iAero, and GEO Group have significant outstanding document discovery, which the County needs
 8 before it reasonably can take several of the remaining fact witness depositions. Moreover, the
 9 County has not received documents necessary for the County to complete its FRCP 26(a)(2)
 10 disclosures. Once the County receives complete document productions, it will diligently review
 11 those documents and then prepare for and complete depositions and its disclosure obligations.
 12 Accordingly, there is good cause to extend the case schedule. *E.g.*, *Carlson v. Am. Pac. Mortg.*
 13 *Corp.*, No. 2:14-CV-01141, 2015 WL 1883974, at *2 (W.D. Wash. Apr. 24, 2015) (finding good
 14 cause to extend case schedule where financial documents had not been produced and were needed
 15 for expert reports); *Rain Gutter Pros, LLC v. MGP Mfg., LLC*, No. C14-0458, 2015 WL 6030678,
 16 at *2 (W.D. Wash. Oct. 15, 2015) (finding good cause to modify case schedule where plaintiff
 17 delayed document production and defendant “had logical reason to wait to take the depositions . . .
 18 until after it received [the] document production from [p]laintiff”).

19 Given the body of discovery work that remains incomplete and that winter holiday
 20 schedules likely will limit the availability of witnesses, the County requests that the court extend
 21 the case schedule by approximately four months. This also will allow the County’s counsel to
 22 prepare for trial given its other trial schedules in the spring.

23 The Government does not oppose this extension. *See* Martinez Decl. Ex. A.

24 IV. CONCLUSION

25 For the above reasons and for good cause shown, King County requests that the Court

1 extend the case schedule by four months consistent with the proposed case scheduling order.

2 DATED this 13th day of October 2022.

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